95-1481

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October-Term, 1995

TROY LEE CHAPA,

Petitioner,

v.

JIM WELLS COUNTY and OSCAR LOPEZ, SHERIFF, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Respondents.

On Reply To Petition For Writ of Certiorari To The United States Court of Appeal For The Fifth Circuit

RESPONDENTS' REPLY AND BRIEF IN OPPOSITION TO TROY LEE CHAPA'S PETITION FOR WRIT OF CERTIORARI

J. G. ADAMI, JR.
Counsel of Record
WARBURTON, ADAMI, McNEILL, PAISLEY & McGUIRE, P.C.
P. O. Box 331
Alice, Texas 78333-0331
Telephone: (512) 668-8101
Telecopier: (512) 668-8106

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether Troy Chapa filed timely Notice of Appeal under either Rule 59(e), which would allow a review of the merits of the District Court's involuntary dismissal, or under Rule 60(b), which would only allow the Fifth Circuit to address error in denial of the 60(b) motion.

The Fifth Circuit's detailed analysis conclusively demonstrates that whether Troy Chapa's post dismissal motions are construed as Rule 59(e) or Rule 60(b) motions, Chapa has still failed to file timely notice of appeal of the District Court's involuntary dismissal.

TABLE OF CONTENTS

Counter-Statement of the Questions Presented for Review i

Table of Contents ii

Table of Authorities ..... iii-iv

Counter-Statement of the Case 1-2

Reasons for Denial of the Writ 2

1. Procedural Background 2-3

2. Analysis of Procedural Facts and Application of Procedural Rules 3-5

3. Argument 5-6

TABLE OF AUTHORITIES

CASES:

Harcon Barge Rentals Co. v.
D. & G. Boat Rentals, Inc.,
784 F. 2d. 665 (5th Cir.)
(en banc), cert. denied,
479 U.S. 930, 1986 2

Zapata Gulf Marine Corp. v.
Puerto Rico Maritime Shipping,
925 F. 2d. 812 (5th Cir.),
cert. denied,501 U.S. 1262
(1991) 3

Huff v. International
Longshoremen's Assn., Local #24,
799 F.2d. 1087,
(5th Cir., 1986) 3

In Re Ta Chi Navigation
(Panama) Corp., S.A.,
728 F. 2d. 699,
(5th Cir., 1984) 3,6

Aucoin v. K-Mart Apparel
Fashion Corp.,
943 F. 2d. 6,
(5th Cir., 1991) 3,6

Lavespere v. Niagare Mach. & Tool Works, 910 F. 2d. 167, (5th Cir., 1990), cert. denied,114 5 Ct. 171 (1993) 6

Seven Elves, Inc. v. Eskenazi, 635 F. 2d. 396, (5th Cir., 1981) 6

CONSTITUTION, STATUTES AND RULES:

Fed. R. Civ. P. 59 (e) 2,4,5

Fed. R. Civ. P. 60 (b) 3,4,5,6

Fed. R. App. P. 4 (a) (4) 3

COUNTER-STATEMENT OF THE CASE

As indicated in Petitioner's brief, the Court of Appeals' opinion attached in the Appendix of Petitioner's brief correctly states the facts in this case. Since this case is conclusively determined on a procedural issue, it is important that the sequential filing of Petitioner's post-dismissal motions be restated here.

On February 14, 1995, the District Court, noting Chapa's failure to appear at a pre-trial conference and failure to contact Defendants since filing the suit, entered an order dismissing Chapa's action without prejudice.

On February 17, 1995, Chapa filed a motion to reinstate his action citing the inadvertence of his counsel to calendar and attend the pre-trial hearing. This motion was struck by the District Court's February 28, 1995 order for failure to comply with local rules. Chapa filed a second motion to reinstate on March 7, 1995.

On April 10, 1995, a hearing was held by the District Court on Chapa's motion to reinstate. An order was entered on April 12, 1995 by the District Court, denying Chapa's motion to reinstate for the reasons stated therein.

On April 17, 1995, Chapa filed a motion to reconsider reinstatement of his cause of action. This motion was struck by order of April 19, 1995 for failure to comply with the local rules of form. On April 21, 1995, Chapa filed a motion for leave to file the motion to reconsider reinstatement. The motion to reconsider was denied by order dated May 19, 1995.

Chapa filed his notice of appeal on May 25, 1995.

REASONS FOR DENIAL OF THE WRIT

1.

PROCEDURAL BACKGROUND

As indicated by the opinion of the Fifth Circuit, the sole issue is whether Chapa's May 25, 1995 notice of appeal was timely. The Fifth Circuit proceeds in their opinion to analyze every possible scenario presented by the sequential post-dismissal filing of motions by Chapa. As stated by the Fifth Circuit, this analysis is somewhat complicated by the District Court's striking of Chapa's very first post-dismissal motion requesting reinstatement, which was filed on February 17, 1995, subsequent to the order of involuntary dismissal entered by the District Court on February 12, 1995.

After involuntary dismissal of his cause of action, if Chapa desired to question the February 12, 1995 ruling of the District Court, it was necessary that he file a Rule 59(e) motion under the Federal Rules of Civil Procedure. Such a motion must be served within ten days of the entry of the judgment. Harcon Barge Rental Co. v. D. & G. Boat Rentals, Inc., 784 F. 2d 665 (5th Circuit) (en banc), cert. denied, 479 U.S. 930 (1986). Such a motion would toll the running of the 30-day period for filing notice of appeal until 30 days from the entry of an order disposing of that motion. Fed. R. App. P. 4 (a)(4); Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping, 925 F. 2d. 812, 816 n. 5 (5th Cir.), cert. denied, 501 U.S. 1262 (1991).

A motion filed after the initial ten day post-judgment period is a Fed. R. Civ. P. 60(b) motion. Such a motion does not suspend the thirty day appeal period. Fed. R. App. P. 4 (a)(4); Huff v. International Longshoremen's Assn. Local #24, 799 F. 2d. 1087, 1089-90 (5th Cir. 1986). Furthermore, as stated in the opinion of the Fifth Circuit in this case;

> "...the denial of a Rule 60(b) motion does not bring up the underlying judgment for review. In Re Ta Chi Navigation (Panama) Corp. S.A., 728 F. 2d. 699, 703 (5th Cir. 1984). This Court 'may not treat the appeal from the ruling on the Rule 60(b) motion as an appeal from the [underlying order] itself.' Aucoin v. K-Mart Apparel Fashion Corp., 943 F. 2d. 6, 8 (5th Cir. 1991) (citation omitted)."

2.

ANALYSIS OF PROCEDRAL FACTS AND APPLICATION OF PROCEDURAL RULES

In their analysis of all of the possibilities presented by the facts concerning Chapa's sequential filing of post-judgment motions, the Fifth Circuit identifies three logical possibilities of the effect the District Court's striking of Chapa's first

motion to reinstate presents. [1]

First, it can be construed that the striking of the motion by the District Court "erases" the motion and its service all together. If such is the case, Chapa's second motion to reinstate filed March 7, 1995 would necessarily be a Rule 60(b) motion, as it was filed and served outside the ten day period required by Rule 59(e). Denial of such motion fails to raise the underlying merits of the judgment on appeal or toll the 30-day appeal period. To raise such an appeal, Chapa would necessarily have had to file Notice of Appeal by March 16, 1995, within thirty days after the Court's entry of the involuntary dismissal.

Second, if the District Court's striking of the first motion to reconsider serves as a "disposition" of that motion, to question the merits of the order of involuntary dismissal, Chapa would have had to file his notice of appeal by April 1, 1995, within 30 days from the March 2, 1995 entry of the District Court's order striking Chapa's first motion to reinstate.

Lastly, if the service of Chapa's first motion to reinstate within ten days of the February 14, 1995 entry of the District Court's involuntary order of dismissal "suspends" the motion if it is subsequently refiled, then the analysis is the same as if the motion had never been struck. It is a timely filed and

---

[1]Of course, if the District Court had not struck Chapa's first motion to reconsider, it would have been clearly characterized as a 59(e) motion, and given that it was in substance disposed of on April 12, 1995, Chapa's deadline for appeal would have been May 12, 1995. His May 25, 1995 Notice of Appeal would be too late to raise the issue of the April 12, 1995 involuntary dismissal to the appeals court.

served Rule 59(e) motion that was disposed of by the Court by order dated April 12, 1995, setting the deadline for appeal at May 12, 1995.

Chapa's May 25, 1995 filing of his notice of appeal misses the deadline in all three of these possibilities. All motions filed after Chapa's first motion to reconsider filed February 17, 1995 (clearly a Rule 59(e) motion) and Chapa's second motion to reconsider filed March 7, 1995 (possibly a Rule 59(e) motion) were filed and served outside of the ten day post judgment period and must necessarily be construed as 60(b) motions, disposition of which fail to toll the running of the 30-day period for appeal or bring the merits of the underlying judgment before the appeals court. Lavespere v. Niagara Mach. & Tool Works, 910 F. 2d. 167 (5th Cir. 1990), cert. denied, 114 5. Ct. 171 (1993). See also In Re Ta Chi Navigation (Panama) Corp. S.A., and Aucoin v. K-Mart Apparel Fashion Corp..

3.

ARGUMENT

Without ever addressing any of the issues set out above, Chapa in his brief makes the conclusory and unsupported statement that "the appellate time requirements were indeed met". In the previous sentence, Chapa makes the entirely erroneous statement that "In dismissing this case, the Fifth Circuit decided not to decide whether the appeal was even properly before it". On the contrary, the Fifth Circuit conclusively decided that on the basis of the foregoing analysis, the appeal was not properly before it, and therefore dismissed it as frivolous.

The Fifth Circuit indicated in dictum that even if the merits of the denial of Chapa's Rule 60(b) motion were before the court (which is the point the Fifth Circuit seems to indicate should have been addressed by Chapa in his brief), that they find nothing in the record "so unwarranted as to constitute an abuse of discretion", citing Seven Elves, Inc. v. Eskenazi, 635 F. 2d. 396, 402 (5th Cir. 1981). Chapa erroneously takes this to indicate that the decision of the Fifth Circuit turns on whether the proper issue was briefed by Chapa, rather than the detailed analysis set forth in the Court's opinion and reiterated herein.

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully request that the dismissal of the appeal by the Fifth Circuit Court of Appeals be undisturbed and that Chapa's Application For Writ of Certiorari be denied.

Respectfully submitted,

J. G. Adami, Jr.
Counsel of Record
WARBURTON, ADAMI, McNEILL,
PAISLEY & McGUIRE, P.C.
P. O. Box 331
Alice, Texas 78333-0331
Telephone: (512) 668-8101
Telecopier: (512) 668-8106

Attorneys for Respondents
Jim Wells County and Oscar
Lopez, Sheriff, Individually and
Official Capacity